SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

In the Matter of the
Bankruptcy of Ascent Ltd., of the
City of Mississauga, in the
Province of Ontario

Estate No.: 32-149265

January 13, 2006

Counsel:	G.F. Camelino	- for the Appellant
	Vern DaRe	- for the Respondent

Heard: December 22, 2005

Reasons

[1] This matter came before me as the appeal by Cafo Inc. ("Cafo") of the disallowance by Zeifman Partners Inc. (the "Trustee") of its secured proof of claim in the bankruptcy of Ascent Ltd. ("Ascent" or the "Bankrupt"), pursuant to s. 135 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). Although nothing substantive turns on this, I note for the record that all of the materials were styled as in the Proposal of Ascent, and not the Bankruptcy. The latter is correct, and, for that reason, this decision is styled in that manner.

[2] On a more substantive note, however, is the fact that at the outset of the hearing, it became evident that Cafo agrees with the Trustee in its Notice of Disallowance, that Cafo is not a secured creditor in the bankruptcy of Ascent. This due to the fact that the passage of time has resulted in the asset over which it had security no longer existing. That asset was the right to receive unearned premiums on the cancellation of a certain policy of insurance, placed and financed by way of a Premium Installment Contract ("PIC") dated July 15, 2004. The insurance policy itself having expired, there remain no unearned premiums, and, thus, nothing over which Cafo may any longer claim security. Accordingly, the Disallowance by the Trustee of Cafo's secured Proof of Claim is proper, and the appeal is dismissed, in that regard.

[3] Despite this, the parties agreed, at the hearing, that the dismissal would result in the advancement by Cafo of a property Proof of Claim, wherein Cafo would claim that

the Bankrupt was holding $24,374.00 of cash or other property at the time of its deemed assignment in trust for Cafo. The basis of this claim is the Order of the Honourable Madam Justice Hoy, made in the Proposal on February 17, 2005. The parties also agreed that the result of such a Claim by Cafo would be its denial by the Trustee, resulting in a fresh appeal of that, under s. 81 of the BIA. Accordingly, the parties agreed to proceed to argue this matter on the basis that such a property Claim had been advanced, disallowed, and appealed. Ordinarily, Courts should not hear matters on a conjectural or hypothetical basis, but, as the materials and argument were already before the Court, I saw no point in putting off to a later date that which could be determined now, and heard the matter.

Facts

[4] As indicated above, Cafo financed the acquisition by Ascent of an insurance policy, for the benefit of Ascent. This financing was pursuant to the PIC. In the PIC, Ascent assigned to Cafo the right to any unearned premiums under the Policy, as security for payment by Ascent to Cafo under the PIC. Default in payment under the PIC occurred in December, 2004, with the failure by Ascent to make the December, 2004, payment to Cafo. Ultimately, no further payments were made under the PIC.

[5] On January 14, 2005, Ascent filed a Notice of Intention to make a proposal. This stayed the efforts of Cafo to enforce payment of the amounts due under the PIC, whether Cafo was a secured or unsecured creditor. At that point in time, it was the position of Cafo that it was a secured creditor. It was the position of Ascent and the Trustee (which was then the Proposal Trustee), that Cafo was an unsecured creditor. The reason for this disagreement had its genesis in the decision of Mr. Justice Farley in *Re Stelco*, 49 C.B.R. (4^{th}) 283 ("Stelco 1"), wherein, on nearly identical facts, Mr. Justice Farley had held that, absent registration of a Financing Statement under the *Personal Property Security Act* ("PPSA"), Cafo had no perfected security under a PIC. There, as in the case at bar, Cafo had not registered a Financing Statement, relying on certain exemptions in s. 4 of the PPSA and s. 138 of the *Insurance Act*. Cafo had obtained a contrary ruling from a Court of co-ordinate jurisdiction, namely the order of Cameron J. dated June 28, 2001, in the unreported matter of *Icon Laser Eye Centers Inc.*, Ct. File No. 01-CL-41759. Cafo had also appealed the decision of Farley, J. to the Court of Appeal.

[6] Given the stay engendered by the NOI, and the refusal of both Ascent and its Proposal Trustee to either pay the amounts due to Cafo or allow Cafo to cancel the policy and realize on its secured position, despite the continued enjoyment by Ascent of the insurance coverage to its benefit and the benefit of the body of its creditors, Cafo moved before Madam Justice Hoy for either an Order lifting the stay, pursuant to s. 69.4 BIA, or requiring the Proposal Trustee to establish a fund to satisfy Cafo's claim. The latter was an effort to practically deal with the fact that mere effluxion of time would render the value of the unearned premiums as nil, and wipe out any security of Cafo long before Stelco 1 could be appealed. At the time of the motion, the value of the unearned premium was $24,374.00, and that is the amount Cafo sought to have set aside.

[7] Both Ascent and the Proposal Trustee were served with notice of the motion. Only Ascent appeared in response. Her Honour ordered that "$24,374.00 shall be set aside by Ascent, and held in trust, pending the Court of Appeal's decision in Stelco or further order of this court." That Order was appealed by Ascent, and ultimately dismissed for delay on April 27, 2005, two days after the Court of Appeal released its decision in the appeal of Stelco 1. Counsel for Cafo inquired of counsel for Ascent on April 27, 2005, as to how Ascent wished to proceed to resolve this matter, given that the Court of Appeal in Stelco 1 had found in Cafo's favour that Cafo was, in circumstances just such as in the case at bar, a secured creditor. The upshot of that inquiry is that Ascent takes the position that the Order of Madam Justice Hoy was stayed under s. 195 of the BIA, by Ascent's appeal thereof, and that that excuses Ascent from its failure to comply with her Order. This despite the fact that said stay dissolved on April 27, 2005, when Ascent's appeal was dismissed, and Ascent was not deemed to have made an assignment in bankruptcy until May 18, 2005, when its proposal was rejected. No explanation has been offered by Ascent or the Trustee for Ascent's failure to comply with Madam Justice Hoy's Order between April 27, 2005, and May 18, 2005. I find that Ascent had an obligation on April 27, 2005, to comply with Justice Hoy's order to set aside $27,374.00 and to hold same in trust for Cafo, which it did not do.

[8] Subsequent to the bankruptcy, the Trustee has now set aside the said sum, pending the outcome of this appeal. It has done so, it claims, as a courtesy. Much was made in the materials of both parties of the Trustee not having control over Ascent as proponent, and of behaviour of the Trustee. I find all of this to be irrelevant to the legal issues at hand, as will be seen below.

Law

[9] Cafo argues that Ascent and the body of its creditors have been unjustly enriched by the circumstances in this matter, and that the proper remedy is the declaration of a constructive trust over sufficient of Ascent's assets at the time of bankruptcy as are necessary to provide Cafo with the sum of $24,374.00 as had been ordered set aside by Madam Justice Hoy. Of course, if the Hoy Order had been complied with, the matter would be quite straight forward as there would have been the sum of $24,374.00 set aside, and impressed with a clear legal trust pursuant to Court Order. This not being the case, Cafo must look to equitable constructs such as unjust enrichment and constructive trust to have its remedy.

[10] What is unjust enrichment, and can it form the basis of the use of the constructive trust in a commercial insolvency to provide an appropriate remedy?

[11] *Soulos v. Korkontzilas* (1997), 46 C.B.R. (3d) 1 at 9 (S.C.C.) provides clear authority, building on *Becker v. Petkus*, [1980] 2 S.C.R. 834 (S.C.C.), for the proposition that a constructive trust may be imposed "where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment…". A constructive trust imposed in a

case of unjust enrichment is a tool of a Court of equity to remedy a legal wrong. It is, as a result, often referred to as a remedial constructive trust.

[12] Are the requisite three elements present in the case at bar? In my view they are. Clearly, Ascent was enriched by the ability to retain and consume the insurance coverage in question. Had Cafo had its way, the policy would have been cancelled by it for Ascent's default under the PIC, and the unearned premium would have been paid to Cafo, and applied against Ascent's PIC indebtedness. Ascent would have lost insurance coverage, no doubt something of value to it or it would not have resisted the cancellation of the policy by Cafo in the first instance. Not only did Ascent retain the insurance coverage, but it has not had to pay for the coverage, to the extent of at least the $24,374.00 in dispute. As a result, there was at the time of Ascent's bankruptcy some $24,374.00 more in the asset pool available for the creditors (or, if there had been no bankruptcy, available for Ascent).

[13] With respect to the corresponding deprivation, I am inclined to agree with Mr. Justice Cory in *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 (S.C.C.), at 631, where His Lordship stated:

> "Indeed, I would have thought that if there is an enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment. there [sic] is ample support for the proposition that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic."

Accordingly, I find that there is a corresponding deprivation of Cafo to the enrichment of Ascent.

[14] Was there a juristic reason for the enrichment and deprivation? This requires a consideration of the relationship between Ascent and Cafo, and the effect of the intervening Order of Madam Justice Hoy. Absent the Hoy Order, the enrichment of Ascent by payment of its insurance premiums by Cafo without paying Cafo in full for those payments is an enrichment for which juristic reason may be found, as that is the very nature and intent of the PIC. In other words, most debtor-creditor relationships are going to involve, by the advancement of credit, an unjust enrichment if that credit is not repaid. However, as the enrichment, at least for the period of time until repayment, is the very nature of the credit agreement, such an agreement or contract constitutes a juristic reason, and the enrichment will not be viewed as unjust. This is as discussed in *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (O.C.J. G.D.), wherein Blair J., as he then was, sets out at pp. 772-773 certain elaborations on juristic reason in unjust enrichment.

[15] However, in the case at bar, we have the intervention of the Hoy Order, which, in my view, changes the landscape dramatically, and cries out for equity to intervene. In this case, make no mistake: however much Ascent may rely upon s. 195 of the BIA, there

remained a clear period of time prior to its deemed assignment wherein Ascent failed to obey Her Honour's Order and set aside funds in trust for Cafo. This failure is the source of the unjust enrichment, not the PIC. As stated above, the result is that the Estate of Ascent has been augmented by the said sum. While I recognize that the debtor pool is also increased by like amount, mathematically the creditors are better off by the augmentation of the asset pool even though the debtor pool increases. This is not, as was argued at the hearing, a wash. Consider if there were unsecured claims totaling $100,000.00, and assets of $50,000.00 available to satisfy them. Clearly the creditors would be better off if there were $75,000.00 in assets to satisfy $125,000.00 in claims, as each creditor of the previous class will receive a slightly larger dividend when the extra $25,000.00 in assets is added to the Estate – obviously at the expense of the new $25,000.00 claimant also added to the debtor class. This is the case herein. The creditors are being enriched by the additional availability to them of the $24,374.00 that Ascent failed to set aside under the Hoy Order, and Cafo, which would otherwise receive all of those funds as trust funds, must now share with the other creditors – clearly to its detriment. The only reason for this situation is the failure of Ascent to obey a Court Order, notwithstanding its own resort to this Court first by way of a proposal and secondly by way of a deemed assignment. I can find no juristic reason in this to support the enrichment. It is surely not a juristic reason if the enrichment is the result of failure to obey the Court's own Order, and I so find.

[16] Having found that unjust enrichment has occurred herein, should the Court use the tool of a remedial constructive trust to remedy this? In considering this, it is important to remember that unjust enrichment is a concept which may quite properly be used in commercial cases. Winkler J., as he then was, in *Re Brown & Collett Ltd.* (1996), 11 E.T.R. (2d) 164 (O.C.J. G.D.) at 179 found this to be the case, and that it is appropriate for promoting "honest dealing and sound commercial conscience."

[17] It also important to consider that imposition of a remedial constructive trust will take out of the hands of the Estate and the creditors the sum in dispute, and turn it over, in its entirety, to Cafo. This will clearly be a disruption of the scheme laid out in the BIA. This was the position of the Trustee at the hearing. I have considered this, but I have also considered *Brown* and the cases cited therein. I am satisfied that it is, in certain cases, appropriate to do injustice to the BIA in order to do justice to commercial morality. After all, the cases are too numerous to cite wherein commercial morality is considered in insolvency settings. It is the clear role of the Bankruptcy Court to act as the arbiter of commercial morality, and I find no offence in equity intervening, even at the expense of the formulaic aspects of the BIA scheme of distribution. It is simply not right for Ascent and its creditors to benefit from Ascent's failure to obey the Hoy Order, and then come to this Court to seek to retain such an unjust enrichment.

[18] Similarly, I am not moved by the Trustee's arguments that the funds which have been set aside are GST refunds. The right to receive those refunds must have existed at the time of the deemed assignment in order for them to have crystallized and fallen into the Estate. It must be remembered that the point here is that if the Court does not impose a remedial constructive trust on sufficient of Ascent's assets to return to Cafo the sum of

$24,374.00, then an injustice occurs. It matters not which assets are consumed to remedy this.

[19] I have also considered the earlier decision of Registrars Holmested, K.C. and Reilly in *In re Inrig Shoe Company Limited* (1924), 4 C.B.R. 516 and *In re Thompson*, (1930), 11 C.B.R. 263, both of this Court, respectively, and distinguish them both. These cases dealt with legal trusts, and the inability to use assets to satisfy those trusts where tracing could not take place. This is very different, in my view, from the use of an equitable tool to do justice.

[20] Accordingly, I find it appropriate to impose over the assets of Ascent, in the hands of the Trustee, a remedial constructive trust, in favour of Cafo, in the amount of $24,374.00. In the context of how this hearing was structured, Cafo may prove a claim for such an amount as a property claim pursuant to this declaration of remedial constructive trust, and the Trustee is to allow same. While this may be a slightly awkward way to go about things, in terms of the best use of Court time, it was certainly practical and expedient and the parties and their counsel are to be commended for being flexible enough to proceed in this manner.

[21] At the conclusion of the hearing, it was agreed that counsel would like to speak to costs, dependent upon the outcome. Accordingly, counsel may arrange to bring the matter back on before me for that purpose.

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Scott W. Nettie
Registrar in Bankruptcy